

Mandatory Mediation in Actions for Determination and Cessation of Unfair Competition in the Light of High Court of Appeals Precedent

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(I) Introduction

Mandatory mediation for commercial disputes is a legal procedural requirement in Turkey that requires parties to engage in mediation before initiating a lawsuit. This requirement is established in the Turkish Commercial Code No. 6102 (“TCC”), which was amended in 2018 to include mandatory mediation for certain types of disputes. Lawsuits that are subject to mandatory mediation and brought to the court without completing the mediation stage are dismissed due to the absence of procedural prerequisites as per amendment article 5/A of TCC.

In addition to the foregoing, 11th Civil Chamber of High Court of Appeals issued a decision (“**Decision**”) regarding claims for pecuniary and non-pecuniary damages which are claimed with the determination and cessation of unfair competition in a single lawsuit. According to the Decision, *“Applying to a mediator before filing a lawsuit for receivables and compensation claims, the subject matter of which is the payment of a sum of money, has been accepted as a procedural requirement. In the event that the subject matter of the lawsuit is more than one and some of them are subject to a monetary claim and some of them are not subject to a monetary claim, i.e. there is an accumulation of cases within the meaning of Article 110 of the Turkish Civil Procedure Code and there is a connection between the claims within the meaning of Article 166 of the Turkish Civil Procedure Code, there is no provision on how the dispute will be resolved. Although there is no provision on how the dispute will be resolved in the event that there is a connection between the claims within the meaning of Article 166 of the Turkish Civil Procedure Code, in accordance with our Constitution, considering that the court jurisdiction is the main one in the resolution of the dispute, the cases in which there is an accumulation of claims, which are connected between them and which include claims that are and are not subject to the amount, should be resolved by the*

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court without being subject to mediation.” (11th Civil Chamber of High Court of Appeals, numbered 2020/933 E. and 2020/5776 K. and dated 9.12.2020)

As stated in the Decision, as per article 5/A and 4 of TCC, applying to a mediator before filing a lawsuit for receivables and compensation claims, the subject matter of which is the payment of a sum of money, is a procedural requirement. Determination and cessation of unfair competition lawsuits are exclusively not in the scope of mandatory mediation since the request subject is not monetary. However, in practice, these lawsuits generally include the pecuniary and non-pecuniary damages claims of the plaintiff. Therefore since the claims are monetarized they should be under the scope of mandatory mediation requirements. However, the Decision suggests otherwise. In this article; first, mandatory mediation for commercial disputes will be summarized then the Decision will be deeply examined in accordance with other precedents of the High Court of Appeal regarding the subject and the importance of the Decision in practice will be determined.

(II) Explanation of Mandatory Mediation Provision for Commercial Disputes

As stated above in the introduction, mandatory mediation for commercial disputes is a legal procedural requirement in Turkey that requires parties to engage in mediation before initiating a lawsuit. This requirement is established in the TCC. Lawsuits which are subject to mandatory mediation and brought to the court without completing the mediation stage are dismissed due to the absence of procedural prerequisite due to the amendment on Article 18/A of the Law Numbered 6325 (“**Mediation Law**”). As per that article, if a lawsuit is subject to mandatory mediation, minutes of the final mediation meeting must be submitted to the court with the lawsuit petition. If it is not submitted to the court, the court grants 1 week to remedy the deficiency, otherwise the case will be dismissed on procedure. If the mediation stage was never initiated or attended the case will be dismissed without any other action. According to the Turkish Code of Civil Procedure No. 6100 (“**Law No. 6100**”). As per Article 115 of Law No. 6100, lack of procedural prerequisites is a dismissal reason for the procedure.

Under the mandatory mediation system, parties must first attempt to resolve their dispute through mediation before they can initiate a lawsuit. If the parties cannot reach a settlement through mediation, they may proceed with filing a lawsuit. However, if a party fails to attend

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the mediation session without a valid excuse, they may face sanctions, including the obligation to pay the mediator's fees.

Mediation is a form of alternative dispute resolution in which an impartial third party, the mediator, facilitates negotiations between the parties to help them reach a mutually acceptable settlement. The mediator does not make a decision or impose a solution but rather helps the parties communicate effectively and explore possible solutions. Also, the aim of mandatory mediation in commercial disputes is to encourage parties to resolve their disputes outside of court, which can be a faster and less expensive option than litigation. The system is intended to reduce the burden on the court system and improve the efficiency of dispute resolution.

The scope of mandatory mediation for commercial disputes in Turkish law is defined by Article 4 and 5/A of the TCC. As per Article 5/A, all commercial disputes which are monetarized, meaning the claims for receivables and compensation claims, the subject matter of which is the payment of a sum of money is subject to mandatory mediation. The law requires parties to attempt mediation before initiating a lawsuit for certain types of commercial disputes, which are listed in Article 4 of TCC including:

- Claims arising from commercial transactions, such as the sale or purchase of goods, the provision of services, or the leasing of commercial property.
- Disputes between merchants, such as those related to contracts, payment, and delivery.
- Claims related to commercial agreements, such as franchising, distribution, and agency agreements.
- Claims arising from disputes between shareholders, partners, and managers of commercial enterprises.
- Claims related to the registration, use, and protection of trademarks, patents, and intellectual property rights.
- Claims arising from disputes between banks and their customers.
- Claims related to insurance contracts and disputes between insurance companies and policyholders.
- And all other commercial lawsuits and disputes (meaning the parties are Merchant) which are monetarized claims are subject to mandatory mediation.

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In summary, mandatory mediation for commercial disputes is a legal requirement in Turkish law that requires parties to attempt mediation before filing a lawsuit. The system is intended to encourage parties to resolve their disputes outside of court and improve the efficiency of the dispute resolution process.

(III) Summary of the Decision

The plaintiff's attorney stated that the works created by his client were used by the defendant at Istanbul Airport without any contractual relationship. Therefore, the defendant violated the copyrights and created unfair competition. The plaintiff requested the determination and cessation of unfair competition, as well as TRY 5,000.00 for pecuniary damages and TRY 95,000.00 for non-pecuniary damages, without prejudice to their rights regarding the surplus.

The Court of First Instance decided to dismiss the case due to procedural reasoning with the preliminary decision, on the grounds that the lawsuit was subject to the mandatory mediation pursuant to Article 5/A of TCC but the lawsuit was filed without resorting to a mediator, Therefore procedural prerequisites were not met and the case was dismissed due to lack of procedural prerequisite. The defendant took the case to The Regional Court of Appeals, yet the case was dismissed on the same grounds. The defendant then took appealed to The High Court of Appeals.

In the examination of the High Court of Appeals, it is stated that, in the event that the subject matter of the lawsuit is more than one and some of them are subject to a monetary claim and some of them are not subject to a monetary claim, i.e. there is an accumulation of cases within the meaning of Article 110 of the Law No. 6100 and there is a connection between the claims within the meaning of Article 166 of the Law No. 6100 there is no provision on how the dispute will be resolved, i.e. The High Court of Appeals considers such cases not under the scope of Article 5/A of TCC as both The Court of First Instance and Regional Court of Appeals did. Since The High Court decided that there are no special provisions in Turkish procedural legislation on how the dispute will be resolved, it searches remedy in the constitution. And in accordance with The Turkish Constitution The High Court decided, considering that the court jurisdiction is the main way of resolution of disputes, the cases in which there is an accumulation of claims, which are connected between them and which

include claims that are and are not subject to the amount, should be resolved by the court without being subject to mediation. Thus decided the reversal of the decision of the Regional Court of Appeals and returning the case file to The Court of First Instance to be examined.

Dissenting opinion states that since there is no accumulation of cases within the meaning of Article 110; because the claims were not under the equal competence since monetarized claims were under the jurisdiction of mediation and others were under the jurisdiction of courts, even if there was a connection between claims, due to lack of equal competence conditions set by the article 166/1 was not met in the case. Dissenting opinion also states that since there is no accumulation of cases, monetarized claims should have been dismissed due to lack of procedural prerequisite where determination and cessation of unfair competition had to be examined.

(IV) Examination and Evaluation of the Decision and Recent Precedent of High Court of Appeals

It can be understood from the Decision that High Court of Appeals separates accumulated cases from lawsuits with single claims and while examining the procedural prerequisite, one of the many claims being monetarized does not make the case monetary as a whole in the belief of the Chamber.

11th Civil Chamber of The High Court of Appeals has set a precedent with this decision. More recent decision of the same Chamber¹ is in line with the Decision at hand. The Chamber applies this precedent to all accumulated cases, whether or not the case being a determination and cessation of unfair competition is not of importance. Accumulated cases which includes non-monetary claims are not subject to mandatory mediation as the judgement of the High Court of Appeals. Foretold recent decision of the Chamber is regarding an accumulated lawsuit where the plaintiff requested the determination of ownership and payment of due receivables. In that case The First Instance Court dismissed the case due to procedural reasoning with the preliminary decision, on the grounds that the lawsuit was subject to the mandatory mediation pursuant to Article 5/A of TCC. Regional Court of Appeals overruled

¹ 11th Civil Chamber of The High Court of Appeals, Decision Date: 10.01.2022, E. 2021/6724, K. 2022/13

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the decision of The First Instance Court in line with the precedent set by the Decision. Therefore in practice, according to the precedent, while filing an accumulated lawsuit in the meaning of Article 110 of Law No. 6100 if any of the claims constituting that case are non-monetary mandatory mediation is not required in order to file the case i.e. mandatory mediation in commercial disputes which are accumulated cases in the meaning of Article 110 of Law No. 6100 is not a procedural prerequisite if one any of the claims are not subject to the payment of a sum of money. Even the Regional Court of Appeals decisions² are in line with the precedent set by the Decision. There are numerous identical High Court of Appeals decisions³ of the same Chamber, because the lack of decisions of any other chamber regarding the subject.

(V) Conclusion

It can be understood from the Decision and the precedent of the High Court of Appeals that where there is an accumulation of cases within the meaning of Article 110 of Law No. 6100 and there is a connection between the claims within the meaning of Article 166 of the Law No. 6100 even if such claims are subject to mandatory mediation since there is no specific provision regarding how the dispute will be resolved, the main dispute resolution authority i.e. courts should have the competence and mandatory mediation would not be considered as a procedural prerequisite unless all of the accumulated claims are subject to it i.e. all of the claims that constitute an accumulation of cases are monetary commercial claims.

To summarize; even if the precedent states that Article 5/A of TCC (mandatory mediation for commercial disputes) won't be applied to accumulated cases in the meaning of articles 110 and 166 of Law No. 6100, in order to be on the safe side and avoid the risk (and time spent during exhaustion of remedies until the High Courts), we recommend to complete the mediation process first regarding all the disputes under the scope of Article 5/A of TCC.

² 16th Civil Chamber of İstanbul Regional Court of Appeals, Date:25.09.2020, E. 2020/1224, K. 2020/1447

³ 11th Civil Chamber of High Court of Appeals, 10.02.2020, 2019/3048 E 2020/1093 K; 17.02.2020, 2020/197 E 2020/1578 K; 09.12.2020, 2020/933 E 2020/5776 K

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